

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:11-cv-10876-MLW

4
5 BOSTON PRIVATE BANK & TRUST COMPANY,
6 Plaintiff

7 vs.

8
9 TODD RASSIGER and FIRST REPUBLIC BANK,
10 Defendants

11 *****

12
13 For Hearing Before:
14 Chief Judge Mark L. Wolf

15 Motion for Preliminary Injunction

16
17 United States District Court
18 District of Massachusetts (Boston)
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Wednesday, June 22, 2011

22 *****

23 REPORTER: RICHARD H. ROMANOW, RPR
24 Official Court Reporter
25 United States District Court
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ALSO PRESENT: (Via telephone.) EDWARD DOBRANSKI, ESQ.

Vice-President and General Counsel, First Republic Bank

1 P R O C E E D I N G S

2 (Begins, 10:30 a.m.)

3 THE CLERK: Case Number 11-10876, Boston
4 Private Bank & Trust versus Todd Rassiger, et al. The
5 Court's in session. You may be seated.

6 THE COURT: Good morning. Would counsel
7 please identify themselves for the Court and for the
8 record.

9 MR. GLOVSKY: Good morning, your Honor.
10 Richard Glovsky for the plaintiff, Boston Private Bank.

11 MR. KURTZ: David Kurtz for the plaintiff,
12 Boston Private Bank.

13 MR. GLOVSKY: And, your Honor, with us is
14 Megan Chambers who's General Counsel at the bank.

15 THE COURT: Thank you.

16 MR. BROOKS: Good morning, your Honor. Doug
17 Brooks for the defendant Todd Rassiger.

18 MR. COMMISSO: Good morning, your Honor, John
19 Commisso for Mr. Rassiger.

20 MR. GURYAN: Good morning, your Honor, Barry
21 Guryan for First Republic Bank.

22 MS. DEMPSEY: Good morning. Aime Dempsey for
23 First Republic Bank, admitted pro hac.

24 THE COURT: And who do we have on the
25 telephone?

1 MR. GURYAN: Your Honor, we have Mr. Ed
2 Dobranski, who is the Vice-President and General Counsel
3 of First Republic.

4 THE COURT: And, Mr. Dobranski, can you hear
5 us?

6 MR. DOBRANSKI: I can hear you fine. I can
7 hear you, your Honor, very well. The other guys are a
8 little bit muted.

9 THE COURT: Well, I will encourage them to
10 speak into the telephone.

11 And is from Rassiger here as ordered?

12 MR. BROOKS: He is, your Honor.

13 THE COURT: Where is that?

14 MR. RASSIGER: Right here, your Honor.

15 THE COURT: All right.

16 There were some filing made yesterday, a
17 supplemental status report for Mr. Rassiger and the
18 plaintiff filed a motion for a preliminary injunction
19 with regard to First Republic.

20 Is there anything else that was recently filed
21 that I should have received and read?

22 MR. BROOKS: No, your Honor.

23 MR. GLOVSKY: No, your Honor. Although we do
24 have additional affidavits should the Court inquire on
25 certain subjects today.

1 THE COURT: All right. Well, First Republic,
2 of course, hasn't had an opportunity to respond to the
3 motion for a preliminary injunction directed to it,
4 however, if a preliminary injunction issues against
5 Mr. Rassiger, First Republic would be enjoined as a
6 person acting in concert with Rassiger under Rule
7 65(d)(2)(C) in any event. So I think the focus will
8 remain on the motion concerning Mr. Rassiger.

9 First Republic does have to respond to the
10 complaint. I think it was filed about --

11 MR. GURYAN: Your Honor, it was filed June 3rd
12 and an answer is due June 29th.

13 THE COURT: Okay.

14 MR. GURYAN: That was an amended complaint.

15 THE COURT: Correct. And I expect we'll be
16 discussing scheduling after I resolve the preliminary
17 injunction issue.

18 I'm well familiar with the submissions and I
19 think it would be helpful, though, for me to get an
20 update on your views on certain questions. The
21 defendant contends that a preliminary injunction is not
22 necessary. I'm interested in your respective views on
23 that and on whether if I do proceed as I expect I will,
24 Mr. Rassiger wants to testify. I'm certainly open
25 minded but I'm skeptical about some of the

1 representations made in his declaration concerning his
2 motives or state of mind when he took these many
3 documents which are, at the moment, appear to me to
4 include trade secrets.

5 I'm interested in knowing, if I do issue a
6 preliminary injunction, what it should enjoin. I'm
7 interested in knowing what the remaining discovery
8 dispute would be to be resolved if the preliminary
9 injunction issues or perhaps if it doesn't. I might
10 employ the magistrate judge for that. And I'm
11 interested in knowing who the clients A and B are and
12 why their names shouldn't be in the record. They're
13 obviously going to be witnesses in this case. And if
14 there is a reason to keep their identity out of the
15 public record, it needs to be part of the record, I
16 think, in some fashion.

17 But, Mr. Glovsky, do you want to start by
18 addressing those preliminary issues.

19 MR. GLOVSKY: Certainly, your Honor. I think
20 it's very clear, your Honor, that Mr. Rassiger, um,
21 committed a theft here and that he knowingly did so.
22 And ever since he committed that theft -- and I think
23 that when you're referring to Mr. Brown's affidavit, it
24 appears that he did so on at least six dates, nine
25 different times. So -- and even he acknowledges, your

1 Honor, that he did take material that perhaps he
2 shouldn't have taken. And the reason that we
3 particularly need the injunction is because he, and I
4 would submit the bank, the First Republic Bank, too,
5 have proven, in the short duration of this case, that
6 they cannot be trusted with the documentation that
7 Mr. Rassiger took from Boston Private Bank.

8 Among other things your Honor, um, we have
9 recently learned that Mr. Rassiger wiped clean two of
10 the flash drives onto which he downloaded information,
11 obviously transferring them someplace else in attempting
12 to hide his theft.

13 Also, you may recall that in his affidavit that he
14 submitted in his declaration he said he had the three
15 flash drives. Well, it turned out -- and we said he had
16 four. It turned out he did have four. And after we
17 attempted to engage in trying to ascertain what, in
18 fact, he had taken and after representatives from my
19 firm and the bank's expert, as well as Mr. Rassiger,
20 spent quite a bit of time at his home one night making
21 copies, which we haven't yet seen, which I can explain
22 to the Court in a minute, but making copies of his
23 personal computers, low and behold a few days later we
24 got a note from counsel telling us, "Oh, we found
25 another flash drive onto which he downloaded" --

1 THE COURT: And was that after you had told
2 them that you believed that there were four, not three?

3 MR. GLOVSKY: That's correct. So there's no
4 reason -- and there are many other reasons that I think
5 are fairly pronounced in what we presented to the Court
6 to suggest that neither Mr. Rassiger nor his new
7 employer can be trusted with anything other than an
8 injunction.

9 THE COURT: All right, that flushes out what I
10 inferred would be your concern and the essence of your
11 argument. Mr. Brooks?

12 MR. GLOVSKY: And I would also mention, your
13 Honor, that there is -- in the information he took
14 there's a great deal of personal information, data about
15 clients, individuals, all of which is extraordinarily
16 sensitive. So there's a public interest involved here,
17 too.

18 MR. BROOKS: Just to address those issues,
19 your Honor. We've also looked at these flash drives and
20 our experts, after a preliminary review anyway, don't
21 find any evidence that these were wiped clean. And I'm
22 not sure what that refers to, your Honor, but that's not
23 the report we got. We did get a letter late last night
24 from them saying they found that -- I'm a lay person
25 obviously but I understand that sometimes on preliminary

1 reviews that can show up and it turns out that's not the
2 case, so we do not agree with that, your Honor.

3 In terms of the flash drives, it's a little hard
4 for me to say because I came in late in the day, but
5 this is the first I've heard that they said there was a
6 missing flash drive. Mr. Rassiger found a flash drive
7 on his own and gave it to them. So I'm not sure how
8 that can possibly be evidence of bad faith. They didn't
9 know about this. He said, "I found it here. Copy this
10 one as well."

11 THE COURT: Okay. Well, I'm prepared
12 essentially to decide the motion for a preliminary
13 injunction on the record as it exists, but, I'm sorry,
14 Go ahead. We do have another party.

15 MR. GURYAN: Yes, please, your Honor.

16 I just wanted to point out that on July 3rd, as
17 you know, the complaint was amended to add the bank,
18 First Republic, and after 18 days, yesterday they
19 decided to make a motion for a preliminary injunction
20 against the bank. In fact, if you look at the affidavit
21 that's attached to Mr. Rassiger's declaration from
22 Katherine August-deWilde, she says specifically that
23 their bank didn't use the information, they didn't rely
24 on the information, they didn't get any --

25 THE COURT: I think it says the opposite, it

1 says that she got information about the interest rates
2 from both Mr. Rassiger and the clients, A and B.

3 MR. GURYAN: I'm sorry. With respect to the
4 clients, it's clear that Client A approached
5 Mr. Rassiger after he came to First Republic and --

6 THE COURT: What makes that clear to me, that
7 Mr. Rassiger told me in his affidavit?

8 MR. GURYAN: There's no evidence that --

9 THE COURT: I know, but this is on a
10 preliminary injunction. I'm sitting here with
11 substantial evidence that Mr. Rassiger is a thief.

12 Look, I'm happy to hear from him, but I'm not
13 considering the motion for a preliminary injunction with
14 regard to the bank which is on the conversion theory
15 that hasn't been briefed by anybody.

16 MR. GURYAN: Well, I --

17 THE COURT: Let me finish. You're going to do
18 better if you listen to me.

19 However, the bank hired Mr. Rassiger. The bank
20 would, in the ordinary course, be covered as a person
21 acting in concert with him if I enjoin him, and that's
22 the way it's going to work. And it's very important --
23 I think somebody could have got here from San Francisco
24 by now and I realize, because I've just finished a
25 7-week trial and started focusing on this more

1 yesterday, that you didn't have that much notice. So
2 it's fine. But the bank's a party and the bank is a
3 person acting in concert with Mr. Rassiger anyway, so
4 I'm going to focus on the Rassiger matter and we'll go
5 from there.

6 MR. GURYAN: I just wanted to say for the
7 record that there are no facts, it's all speculation
8 against the bank.

9 THE COURT: Mr. Rassiger is the bank. He was
10 their employee. If he misused the trade secrets, he was
11 acting on behalf of the bank.

12 MR. GURYAN: Your Honor, there's no evidence
13 that he misused it and there is evidence that he
14 received -- that Ms. DeWilde received this information
15 and undercut, made a low-ball offer to get the
16 business. There's no evidence they relied on any of
17 this information.

18 And I also would say that the injunction that was
19 proposed -- even though it just came in yesterday, is
20 incredibly broad.

21 THE COURT: Well, that actually was something
22 I wanted to get to. I want to understand at the
23 beginning the scope of the injunction I'm being asked to
24 issue. However -- however, um, Mr. Brooks, I'm not
25 persuaded that the issue is moot, although it would

1 permit me to get back to other things, if I was, and
2 I've told you I'm skeptical, for reasons I'm going to
3 describe, but I'm going to listen to your argument about
4 Mr. Rassiger's written explanation as to how what
5 appeared to me to be trade secrets, you know, came into
6 his possession. I don't know whether you're requesting
7 that he get a chance to testify in view of that
8 skepticism. Of course, if he testifies, his testimony
9 has to be truthful.

10 MR. BROOKS: No, your Honor, we weren't
11 planning to have him testify and he's here because of
12 the order.

13 THE COURT: Yes, and I may want to hear from
14 him depending on how the argument evolves, but I
15 understand you're not asking and, at the moment, it's my
16 present intention to decide the matter based on the
17 written submissions, which are thoughtful and thorough.

18 What is -- Mr. Glovsky, what is the scope of the
19 injunction you're now -- the preliminary injunction that
20 you're now seeking?

21 MR. GLOVSKY: Yes, your Honor. Preliminarily
22 what we want to make sure occurs or does not occur is
23 that any information that Mr. Rassiger obtained from the
24 bank is not utilized, is not disseminated, and
25 ultimately -- and your Honor may feel at this point

1 maybe this isn't the Court's decision -- it's not the
2 time for the Court to make this decision, but that
3 ultimately that it be expunged, returned and otherwise
4 there would be no trace left either in Mr. Rassiger's
5 possession or in First Republic's possession of any of
6 this information that he took.

7 THE COURT: And that might be a timing issue,
8 but -- and to the extent there are trade secrets, I
9 think it's First Republic's position that it hasn't used
10 them and it doesn't intend to use them, and it might be
11 prudent for them just to expunge it and satisfy you they
12 expunged it and that would materially reduce the risk
13 that they'll get embroiled in litigation about whether
14 they've been in contempt of any injunction, if I issue
15 one.

16 But, I mean, I thought that part of what you want
17 is -- in the preliminary injunction, is an order
18 restraining the defendants or anybody acting in concert
19 with them from deleting any electronic files or
20 destroying any documents that came from Boston Private
21 Bank. Is that part of it?

22 MR. GLOVSKY: Yes, it is, your Honor.

23 THE COURT: And you're seeking the return of
24 documents and information that you say are trade
25 secrets. I guess I'd have to consider whether that's

1 appropriate on a preliminary injunction. You wanted
2 originally a designated forensic computer expert to have
3 access to all the flash drives used to download. Has
4 that already occurred?

5 MR. GLOVSKY: At this point, based on
6 representations of counsel, without having examined
7 Mr. Rassiger under oath in a deposition, um, our
8 understanding is, yes, we have the four flash drives and
9 we have reviewed them and preliminary reports include,
10 as I mentioned, the fact that apparently two of them
11 have been wiped.

12 THE COURT: And you're asking for access to
13 Mr. Rassiger's personal computers and e-mail accounts by
14 your expert. Has that occurred?

15 MR. GLOVSKY: That has not occurred. What has
16 occurred is there has been an imaging of them, but we
17 couldn't seem to break the logjam over our review of
18 what was imaged. So at the moment there is a code that
19 prevents us from reviewing them. Mr. Kurtz has been
20 more involved in that part of the case than I have, your
21 Honor, and he can explain some of the technicalities
22 relating to that, but the bottom line is that the
23 protocol that's been offered to us to review them we
24 feel is inadequate because it would allow Mr. Rassiger
25 to continue to conceal documents that he took from the

1 bank.

2 THE COURT: All right, so that's still a live
3 issue.

4 MR. GLOVSKY: That is still a live issue.

5 THE COURT: You want an accounting of the
6 information and documents obtained, is that correct, you
7 still want that?

8 MR. GLOVSKY: Yes, please.

9 THE COURT: And what is it -- what is it --
10 what, in addition, are you seeking in the motion that
11 you filed yesterday concerning First Republic?

12 MR. GLOVSKY: Well, essentially the same
13 relief from First Republic, your Honor, so that this
14 information is, at the very least, safeguarded and not
15 disseminated until the Court gets to the merits of the
16 case.

17 THE COURT: All right.

18 And, Mr. Brooks, how do you perceive the discovery
19 issues or the parameters of the injunction? I mean,
20 there are two questions, one, whether there should be a
21 preliminary injunction or not, and you say, "Well, we've
22 agreed to it, so there's no need for an injunction," and
23 open to considering all of this, but what about the
24 scope of -- because I just haven't seen a written
25 agreement signed by the parties, for example.

1 MR. BROOKS: Well, do you want me to for now
2 leave aside the argument why I don't think a preliminary
3 injunction is --

4 THE COURT: Yes, I'm just trying to figure out
5 what's in dispute substantively.

6 MR. BROOKS: Well, as I see it, in terms of an
7 order that he not use or disclose any of the Boston
8 Private information or that he not destroy it, um, we've
9 agreed to that -- first of all, destroying it he
10 obviously couldn't do under the rules of spoliation.
11 Not using it, we've agreed that --

12 THE COURT: Also, under the laws that
13 prevent -- all right. Go ahead. Go ahead.

14 MR. BROOKS: And we've made representations,
15 if that's the case, we've offered, you know, to enter
16 into a stipulation and file it with the Court. So
17 that's not -- in terms of the scope, that's not an
18 issue.

19 The accounting, I think the tough part with that
20 is we just need some clarification because one thing
21 that Mr. Rassiger has been, um, very careful about doing
22 is not -- you know, making sure not to look at anything
23 that could be on his personal computers related to
24 Boston Private, which he would need to do to make an
25 accounting. I'm not really sure if -- I mean, they know

1 exactly -- as I understand from the papers their
2 forensic review is an accounting. So I won't object to
3 that in principle, I just think that it causes problems
4 and that you would have to review those at this time and
5 I don't think they want that.

6 In terms of the issue about purging things, again
7 it's a little mutually exclusive with making sure that
8 he doesn't destroy anything, we had offered -- we, being
9 Mr. Rassiger's former counsel, before he got involved,
10 initially to destroy everything so that he couldn't have
11 access to it and Boston Private took the position, which
12 I understand, that, "No, no, no, that would be
13 spoliation," so we didn't do that.

14 I think the real issue, your Honor, is in terms of
15 what to do with the mirror images of Mr. Rassiger's
16 computers and then the analogous issue of what to do
17 with his personal e-mail accounts. And in terms of the
18 personal computers, we have -- we've issued -- we
19 submitted a forensic review protocol, which is attached
20 to our supplemental status report. Your Honor, I could
21 try to explain it in lay terms about what -- about
22 basically what we're operating?

23 THE COURT: Okay.

24 MR. BROOKS: Just quickly. There are these
25 mirror images and what we've said is -- we've invited

1 Boston Private to, you know, give us search terms so we
2 can search the computer for whatever -- give us whatever
3 search terms you want that you think are going to be --
4 are going to pull up of relevant documents. In the
5 first instance we will do -- our experts will do a
6 search pulling out and get a list of all the documents
7 that it pulls out. We will segregate any attorney-
8 client privileged communications and any irrelevant
9 personal documents, because these are family home
10 computers.

11 What we will do then is then invite their experts
12 into the second search, with those segregated, so they
13 can see how the search went and they can see that
14 they're getting all of these relevant documents. In the
15 meantime in terms of the -- what we would think would be
16 sort of false/positive hits, there would be two
17 categories, attorney-client privileged communications
18 and personal -- irrelevant and personal documents.
19 We'll log all of those. So we won't just make a
20 privilege log, we will also update a log with sufficient
21 detail of "Hey, here's why this document was hit on, but
22 here's why it's not -- here's why it's personal," so
23 that they could challenge that. And within that that's
24 the lay explanation.

25 Apparently the experts -- there's all sorts of

1 ways to electronically tag these documents to satisfy
2 the experts that they know exactly what is not being
3 produced and that there would be no issue later about
4 recreating the search to deal with what -- what we again
5 we would deem as false positives.

6 The issue, your Honor, is -- as I read, the only
7 proposal we have from them, I think, is their proposed
8 order which would just give them access to the computer
9 in the first instance. And I've looked, your Honor, and
10 in terms of the case law, it appears what we're
11 offering, especially at this stage, is far ahead of the
12 curve and I would just --

13 THE COURT: Well, I'm actually -- I'm just
14 trying to find out what's in dispute. As I said, if I
15 issue the injunction and then there's a question where
16 to go from there, then I may have the Magistrate Judge
17 deal with that issue.

18 MR. BROOKS: Okay. Sorry, your Honor.

19 THE COURT: No, this is very helpful. That's
20 very responsive. I just want to make sure I understand
21 the terms. A "mirror image" is what, a complete copy of
22 the hard drive or the information on the computer?

23 MR. BROOKS: Yes, and so not just documents,
24 but also all the relevant meta data. And the same --
25 the functional equivalent of a mirror image -- and I'm

1 not sure if it's called a "mirror image" or not, of his
2 personal e-mail accounts -- because these are g-mail
3 accounts so they don't actually reside on the computer,
4 they reside in the clouds, as they say, that has been
5 copied in the same and the functional equivalent of
6 mirror image in --

7 THE COURT: And is there -- that all of the
8 discussion so far is focused on computerized records,
9 which I understand can be printed out, but are there any
10 other documents about which the plaintiff is concerned?

11 MR. GLOVSKY: Yes, your Honor. Of course,
12 hardcopies may have been made of any of these documents.

13 THE COURT: Yes, but other than the
14 hardcopies, are there any documents at issue that don't
15 come from computerized records that you know of?

16 MR. GLOVSKY: I don't believe so.

17 THE COURT: Okay. And --

18 MR. GLOVSKY: May I have a minute, your
19 Honor?

20 THE COURT: Yes.

21 MR. BROOKS: Your Honor, I'm not sure if I was
22 clear --

23 THE COURT: Just hold on a second.

24 MR. BROOKS: Oh, I apologize.

25 (Pause.)

1 MR. GLOVSKY: We don't know all that
2 Mr. Rassiger did. We know about 1500 documents that he
3 downloaded. So what we're looking for, your Honor, is
4 something that encompasses whatever it was he took in
5 whatever form he took it.

6 THE COURT: Okay. And I think First Republic
7 expressed some concern about the scope of a possible
8 order?

9 MR. GURYAN: Yes, your Honor. Let me just
10 make two points on that. And that is that --

11 MR. DOBRANSKI: Excuse me, your Honor. Could
12 you ask Mr. Guryan to speak up?

13 THE COURT: Yeah, talk right into that
14 microphone. Your client wants to hear what you say.

15 MR. GURYAN: Yes, I'm away from the
16 microphone. Sorry. Can you hear me now?

17 THE COURT: Is that better?

18 MR. DOBRANSKI: Yes. Thank you.

19 MR. GURYAN: With respect to the order, your
20 Honor, it is very broad and covers public information,
21 an example would be Paragraph Number 3, any information
22 that has to do with Boston Private. You can look on the
23 Internet and find information about Boston Private. All
24 that does is stifle competition and we think that's --

25 THE COURT: And that's valuable. But if I

1 find that trade secrets were taken, I would probably
2 issue an order that covered everything he took and if
3 some of it's public, um, that would be unfortunate, but
4 I don't know how at this point, um -- a preliminary
5 injunction has to describe with specificity what is done
6 and we're not going to do a document-by-document
7 analysis of trade secrets. But actually it's -- I don't
8 mean to discourage you from raising these things, it's
9 very helpful, and there probably are ways that I could
10 write it including, you know, that "You can't use any
11 documents or information taken from, um, the plaintiff,
12 but if the information is also available from public
13 sources and is obtained from those sources, it's -- it
14 can be used."

15 MR. GURYAN: My point, your Honor, was it's
16 not limited to documents that were taken from Boston
17 Private, it just said it's including documents, so it's
18 broader.

19 THE COURT: Okay.

20 MR. GURYAN: The last point is of great
21 concern to First Republic because what they're asking is
22 that an expert of a competitor roam around First
23 Republic's computers to see what it could find. Now,
24 this is no different than a discovery request where you
25 have a discovery and you develop a targeted approach.

1 And this is what we've been doing for the last three-
2 plus weeks with our experts is trying to identify and
3 turn over everything we could. So this would simply be
4 a targeted approach much like what Mr. Brooks identified
5 as just an orderly way to -- either through search terms
6 or other terms that our experts can suggest and rely on
7 and so that a competitor is not just take a fishing
8 expedition.

9 THE COURT: All right. This is just what I
10 was looking for.

11 And why should these customers be called "A" and
12 "B"?

13 MR. GURYAN: Your Honor, from our standpoint,
14 we didn't start that.

15 THE COURT: I know, that was really for
16 Mr. Glovsky.

17 MR. GLOVSKY: Your Honor, just to protect
18 their identity, these are private schools, and we did
19 that because, you know, we thought there may be some
20 sensitivity of them appearing in --

21 THE COURT: Well, this is a reason I think you
22 ought to resolve the case. Any time there's litigation
23 that puts clients there, you're not the only two lenders
24 in the world and you run the risk of your clients
25 playing on both of your houses. But I'll call them "A"

1 and "B" for today, but, you know, obviously they're
2 going to be the subject of discovery if this case
3 endures and there's no contention, I think, that they
4 did anything wrong, so there has to be a reason to seal
5 something and I don't see it at the moment. But that
6 doesn't have to get resolved right this minute.

7 All right. Well --

8 MR. GLOVSKY: Your Honor, just to respond to
9 one point Mr. Guryan made. There's been no proposal
10 that I'm aware of insofar as First Republic's bank
11 documents are concerned and obviously, I think to some
12 extent, First Republic by its association with
13 Mr. Rassiger and I think their knowledge of what he did
14 -- and by the way your Honor should know that
15 Mr. Rassiger, that there is yet another employee, Betsy
16 Sullivan, who recently left the bank and went over to
17 First Republic and also downloaded documentation onto
18 two flash drives which we are now reviewing.

19 So there's a lot of culpability on the other side
20 of this case, I would submit, and to some extent anyway
21 I think they had forfeited, as a result of that
22 culpability, some of the prerogatives that they might
23 otherwise be entitled to.

24 THE COURT: All right. The -- let's get to
25 the merits of this. If I don't issue an injunction, the

1 scope of it is moot.

2 Well, it's my tentative view that an injunction is
3 warranted. I perceive there's a strong likelihood of
4 success on the merits of the misappropriation of trade
5 secret and breach of fiduciary duty claims. The federal
6 claim raises some issues but -- about what "exceeding
7 the scope of authorized access" means, but I think the
8 First Circuit, as opposed to perhaps the Ninth Circuit,
9 seems to be going in the plaintiff's direction. I do
10 think, at the moment, and this is all tentative, that
11 there is a sufficient showing of irreparable harm. A
12 strong showing of likelihood of success on the merits
13 diminishes the degree of irreparable harm or the
14 strength of the showing of irreparable harm that needs
15 to be demonstrated. But as a practical matter, in this
16 case I don't think there would be an adequate remedy at
17 law.

18 There are going to be contentions about whether it
19 was public information or private information that was
20 used and how to value the loss of goodwill that comes
21 with confidential client files being taken. And I don't
22 think there is at the moment, you know, genuine hardship
23 to Boston Private Bank. I don't see the cognizable
24 hardship to Mr. Rassiger or his employer at the moment
25 if he's prohibited from using trade secrets and there's

1 certainly a public interest in not permitting stolen
2 confidential information to be used for someone's
3 competitive disadvantage.

4 And this is an equitable remedy, as I say, and I
5 can get into the details, but Mr. Rassiger's explanation
6 that he just took these things having a vague notion
7 that it would be nice to have the forms or he took some
8 pride of authorship doesn't ring true to me. Some of
9 these things were Boston Private Bank's ratings of the
10 clients, for example.

11 So that's my present state of mind. I'm leaning
12 against the defendant. I feel like I'm fairly familiar
13 if not familiar with the submissions.

14 Mr. Glovsky, I can let you go first or I can let
15 Mr. Brooks go first and give you a chance to respond.

16 MR. GLOVSKY: I'm happy to allow Mr. Brooks to
17 go first, your Honor.

18 THE COURT: Go ahead.

19 MR. BROOKS: Thank you, your Honor, and I'll
20 try to be brief.

21 THE COURT: You don't have to be brief. It's
22 important. I've studied what's in there, but you know
23 this much better.

24 MR. BROOKS: What I think is critically
25 missing from their argument in their motion and

1 ultimately their claims is that they don't explain, much
2 less provide any evidence, of how Mr. Rassiger's
3 possession or more importantly his alleged use of any of
4 this information caused them any harm. And this is not
5 a case, your Honor, about a former employee stealing the
6 secret recipe and going off and giving it to his new
7 employer and it's also not a case about a salesperson,
8 you know, taking a customer list of thousands of
9 nameless customers and being able to then use that to
10 compete. What this is a case about in their papers,
11 your Honor, is two customers, two customers, both of
12 whom were well-known to Mr. Rassiger, one who ended up
13 switching banks based on more favorable interest rates
14 and the other who stayed with Boston Private and got the
15 more favorable interest rate.

16 Now, it's undisputed, if you look at the papers,
17 that the customer's decisions in terms of the one that
18 switched banks, it was all based on a lower interest
19 rate. And Boston Private itself describes these
20 interest rates as unusually low. So this is not -- and
21 this is based on their papers, you don't have to take
22 our word for it, but this is not a case where, based on
23 the information that Mr. Rassiger took, he was able to
24 make subtle undercuts of prices, which you see in a lot
25 of these cases. They admit these were unusually low

1 interest rates. Nothing in these documents could have
2 provided any advantage to Mr. Rassiger. He knew these
3 --

4 THE COURT: Why -- I guess I have a couple of
5 questions. You know, why take them if they're useless,
6 (A) and (B) I mean one of the -- do I remember right
7 that part -- that some of the documents he took had
8 Boston Private Bank's ratings of the clients?

9 MR. BROOKS: A couple of things. In terms of,
10 yes, there were ratings, this goes to a point you made
11 before. There were things such as ratings and I think
12 your Honor questioned, understandably, "Well, how does
13 that fit into this kind of vague notion of using them
14 as" -- We're not talking about documents that there was
15 just a rating document, what this was was sort of an
16 untargeted approach in terms of Mr. Rassiger taking a
17 document because it had, for instance, some form
18 language and because he wasn't giving it a lot of
19 thought though --

20 THE COURT: If you want me to rely on that
21 contention, then Mr. Rassiger's going to go on the
22 witness stand and be cross-examined.

23 MR. BROOKS: I understand.

24 THE COURT: I know it's hard, you know, to
25 make -- it's not the best way to make credibility

1 judgments on a paper record. I'm offering him the
2 opportunity and Mr. Glovsky or somebody can cross-
3 examine him and I might even have a question for him.
4 But I don't, at the moment -- and I'm just trying to be
5 as transparent as possible, think he took these 1500
6 documents because he had pride of authorship and an
7 interest in the forms that he developed and it just
8 happened to get the confidential rating information.

9 MR. BROOKS: I understand, your Honor, and I
10 didn't intend to go there because I don't want him up
11 there. I was trying to answer the question you posed,
12 but I understand we'll -- we'll rely on the record and I
13 understand where your Honor comes down on this.

14 But so, again, rather than focus on that, focusing
15 on what Boston Private's papers say, they admit that
16 this process -- this is an open bidding process. These
17 clients, in other words, say, "Hey, here's what this
18 bank is offering you. Can you beat it? Can you match
19 it?" So I understand there's a skepticism, "Well, why
20 did you have those documents?" But their own papers
21 demonstrate that the documents that they claim to be
22 interested in had no impact on the alleged harm that
23 they claim befell them, your Honor.

24 So even if you were to find that, um, what
25 Mr. Rassiger -- ultimately what Mr. Rassiger downloaded,

1 based on their papers, constituted trade secrets, I
2 don't think they can meet the burden of showing
3 likelihood of success on the merits because they haven't
4 established that they were harmed by that. And, in
5 fact, their own papers seemed to belie that conclusion
6 because they say this First Republic Bank came in and
7 started offering these crazy low interest rates.

8 THE COURT: Well, one of the things that
9 occurred to me as I was reading this is I think the
10 papers say that Mr. Rassiger worked with what 25 private
11 --

12 MR. BROOKS: Yeah, in the neighborhood, yes.

13 THE COURT: And so why were these two targeted
14 by him? I mean, frequently intent, causation, at a
15 preliminary stage -- well, intent or state of mind
16 frequently has to be proven by circumstantial evidence
17 and here we're on a motion for preliminary injunction,
18 neither of you have given me an affidavit from A or B
19 saying it's exactly the way Mr. Rassiger said or it's
20 different. I'd have to decide based on the record and,
21 you know, eventually have a trial, if a trial is
22 necessary, and there would be a fuller record and the
23 facts might come out differently. But, you know, why
24 these two and not the other 23?

25 MR. BROOKS: Are you asking me?

1 THE COURT: Yes.

2 MR. BROOKS: Well, if anything, your Honor, I
3 would think the fact that he has only made -- he has
4 only made it two is to support Mr. Rassiger's thinking
5 that this wasn't a -- I mean, typically in these cases
6 what you see is somebody goes out and just starts -- I
7 can tell you -- I can try to provide an answer, but I
8 think it might just lead your Honor -- it's back to the
9 declaration and I know you don't want to get into that.

10 THE COURT: No, you can go back to the
11 declaration.

12 MR. BROOKS: Well, I think, in terms to
13 Customer A there was an initial, um -- at least the
14 first contact between Mr. Rassiger and Customer A was
15 Customer A reaching out to Mr. Rassiger, which then led
16 to a conversation about interest rates. As I understand
17 it, with Customer B, that was a customer already known
18 to First Republic. And so that's how those two came
19 into being. So that's why it's two of the 25.

20 And I think that's an important point. If you
21 really had the keys to the kingdom, wouldn't this have
22 been Customers A through Y, if there were 25, and that's
23 not what happened.

24 THE COURT: At this point there hasn't been
25 any discovery and I don't know whether, you know, C, D,

1 and E were contacted or just didn't mature into
2 something that the plaintiff knows about.

3 MR. BROOKS: But I think that's right, they
4 would certainly know about them if they lost the
5 business. And there's no -- Mr. Rassiger is not subject
6 to a non-compete or a nonsolicitation, so he's allowed
7 to reach out to these people. And again if these
8 documents really were as important as Boston Private
9 make them out to be, he could steal all of their clients
10 and it would be that simple. But that's not the way it
11 works. Frankly it comes down to -- and I think their
12 own papers support this, "Who's going to give me the
13 best interest rate and I'm going to use banks against
14 each other. I'm going to tell this bank, 'Hey they're
15 giving me this, here's the term sheet, beat it'."

16 So ultimately, your Honor, I think that while
17 there's no argument that Mr. Rassiger took documents,
18 there will likely be a dispute about whether or not they
19 constitute trade secrets or they're confidential,
20 respectfully I don't think plaintiffs have met their
21 burden of showing that they have been harmed by his use
22 of this -- of these documents. And they've done a
23 review -- and I think had they -- I understand this is
24 an early stage, but they've done a big investigation,
25 your Honor, and their own papers not only don't they

1 support the contention that they've been unharmed, they
2 actually undercut it by explaining how the bid process
3 works.

4 THE COURT: Okay. And does First Republic
5 want to be heard, because you're not a direct party, but
6 you would be impacted by the injunction?

7 MR. GURYAN: Yes, I'd like to be heard.

8 With respect to Katherine deWilde, it's clear in
9 at least her affidavit that she has the authority or had
10 the authority to separate, not Mr. Rassiger. That when
11 Customer A and Customer B approached them, um, she
12 decided to do a below-market offer to get the business.

13 This would be analogous to me having a mortgage
14 and going into another bank and saying, "Here's my
15 mortgage, here are my terms, can you do better?" Would
16 the bank that issued the mortgage have a right to sue me
17 for revealing the terms? Of course not. That's absurd.

18 THE COURT: Well, hold on just a second.
19 Where in her affidavit does she say that both A and B
20 initiated the contact?

21 MR. GURYAN: No, what I said is in her
22 affidavit -- in Mr. Rassiger's declaration it's stated
23 that A initiated the contact after he left.

24 THE COURT: Right, but that's -- when you --
25 what you said -- well, no, actually let me tell you what

1 you just said to me. I can read it here on my
2 computer. That's why I asked the question. Sorry it
3 offended you.

4 You said: "With respect to Katherine deWilde,
5 it's clear in at least her affidavit that she has the
6 authority, not Mr. Rassiger, and that when Customer A
7 and Customer B approached them, she decided." So I
8 thought you were telling me something different than
9 what I understood. But you don't take the position that
10 both A and B initiated the approaches?

11 MR. GURYAN: I think we get that from
12 Mr. Rassiger's declaration and I think that Katherine
13 deWilde says that she was presented with the terms from
14 A and B and was asked could she do better and could she
15 meet it? And one customer said they were going to go to
16 a private market and she decided to meet that. And
17 Boston Private apparently met that and they got the
18 information the same way, by asking the customer what
19 the rate was, and met it and kept the client. Customer
20 A, on the other hand, they were able to -- First
21 Republic was able to give a lower rate and got the
22 business.

23 This is what's called competition. To me it's
24 not -- it's exactly what you would expect.

25 THE COURT: It's exactly what you would expect

1 if Mr. Rassiger hadn't stole trade secrets. Competition
2 is good, unfair competition's unlawful, and that's
3 what's got to get sorted out.

4 MR. GURYAN: The other point I wanted to make,
5 though, is at this stage, for such an extraordinary
6 remedy, is it should be based on facts and there is no
7 -- it's speculation that she -- that that had any
8 influence on her decision. As a matter of fact she says
9 it didn't --

10 THE COURT: And where is she?

11 MR. GURYAN: Where is --

12 THE COURT: Yeah, Ms. DeWilde.

13 MR. GURYAN: She's in California.

14 THE COURT: You could have brought her. Here,
15 inferences have to be drawn from circumstantial
16 evidence. I've just spent several hours instructing on
17 this last week in Mr. DiMasi's case.

18 Help me with this. And it's preliminary. I have
19 to make preliminary determinations as Mr. Rassiger is
20 not going to testify. It's my present view that his
21 testimony -- that his affidavit is not credible. That
22 he -- as his discussions with First Republic were
23 evolving and maturing into an offer he systematically
24 took what he knew were trade secrets in violation of the
25 IT policy and the code of conduct policy of his

1 employer. And I sit here with a kind of common-sense
2 question, "Why would somebody knowingly steal trade
3 secrets if he didn't intend to use them?" "Why would he
4 steal them if they didn't have value in the industry as
5 he knows the industry much better than I know the
6 industry?" What's the answer?

7 MR. GURYAN: The answer is that there's no
8 evidence that the bank relied on them and it's -- and to
9 make that leap is speculative. My point is that an
10 injunction is not necessary because for the last three
11 or more weeks the parties have been working diligently
12 to transfer whatever information. The reason that the
13 bank proposal didn't come up yet is, one, we weren't a
14 party until recently, and, two, we hadn't gotten to
15 that.

16 THE COURT: And I'm not deciding about the
17 proposal.

18 MR. GURYAN: All I'm saying, your Honor, is
19 let us continue to discuss this. We don't need an
20 injunction. We're trying very hard to do it.

21 THE COURT: I'm awfully busy and I frankly
22 hoped, if not thought that we wouldn't be here today.
23 But, you know, you have had an unusual amount of time,
24 because of my unavailability, to try to work this out
25 and you haven't done it yet.

1 MR. GURYAN: Well, with respect to the visits
2 to the home, um, Mr. Glovsky said that that wasn't
3 satisfactory, but we have made offer after offer that
4 deals with personal information and they stopped the
5 discussion.

6 THE COURT: And I'm not going to resolve that
7 today. If I issue an injunction, you know, it will be
8 focused, but how -- you know, the discovery issues will
9 be handled in a more deliberate way.

10 MR. GURYAN: The last point I would make is
11 that most of the points in the injunction other than
12 what I told you I objected to with its broadness is not
13 only covered by a litigation hold issue, "shall not
14 destroy," "shall not delete," um, but it's -- we have
15 put fences around information pursuant to that. So
16 we've already done those things and an injunction is not
17 necessary.

18 THE COURT: Okay. Thank you. Mr. Glovsky?

19 MR. GLOVSKY: Yes, your Honor.

20 THE COURT: One of the issues that's come into
21 sharper focus and it was already in focus somewhat for
22 me is, you know, what's -- how has this caused harm?
23 What's the evidence of use? But you can address things
24 more generally.

25 MR. GLOVSKY: Your Honor, with regard to

1 Customers A and B, I think Ms. DeWilde says all the
2 Court needs to know. She says, in the second paragraph
3 of her affidavit, that she got information about the two
4 schools from Mr. Rassiger. So so much for customers or
5 clients A and B.

6 There are also much bigger issues here at stake,
7 much bigger. It's not just Customers A and B, it's not
8 even the 25 customers that Mr. Rassiger serviced when he
9 worked at Boston Private Bank. It is the entire
10 portfolio of the commercial lending division of Boston
11 Private Bank. Mr. Brown's second affidavit explains to
12 the Court that he isolated that document, sent it to one
13 of his two home e-mails, and still retains that document
14 today.

15 The issues in this case and the harm to the bank
16 and to its customers and God knows how many people out
17 there who he has information about, institutions and
18 individuals, that's what we're talking about. We're not
19 talking about just A and B. Although I think we've
20 shown, I think Ms. DeWilde has shown that, with regard
21 to A and B, the information came from Mr. Rassiger. But
22 beyond clients A and B, there's C through Z and so on
23 and so forth, and all these individuals's information,
24 he stole.

25 So, you know, insofar as irreparable harm is

1 concerned, and not to mention the public interest, I
2 think it's overwhelming here, your Honor. We have
3 someone who downloaded nine times, consciously
4 downloaded nine times, in voluminous information, much
5 of which was trade secret information. That's conduct
6 which this court should not countenance for one second.

7 We also have a situation, your Honor, and I failed
8 to mention this earlier, but -- and we have an affidavit
9 that the Court would like to have to the effect that not
10 only did Mr. Rassiger take this information, but while
11 he was taking it he systematically categorized it by
12 client of Boston Private Bank. He created folders in
13 his computer for each of those entities. This was a
14 conscious defalcation and theft and an effort by
15 Mr. Rassiger to not just, you know, compromise Boston
16 Private Bank but to enhance his relationship with his
17 new employer. First Republic is, I think, alone by
18 Ms. DeWilde's affidavit, is a party to that and either
19 its conduct nor his ought to be countenanced.

20 THE COURT: All right. Well, it's always my
21 goal to decide these matters orally, not casually, but
22 orally. I've studied the submissions. The arguments
23 have been helpful, but they haven't altered my tentative
24 view, although they will help me refine the scope of the
25 injunction. But the motion for a preliminary injunction

1 is hereby allowed.

2 By way of background, since the transcript will be
3 the detailed findings required, I'll say that on May 16,
4 2011, the plaintiff, Boston Private Bank & Trust Company
5 filed a complaint against defendant Todd Rassiger, the
6 former Senior Vice-President at Boston Private who is
7 now employed at First Republic Bank, a competitor of
8 Boston Private, in the commercial loan market.

9 On June 3rd, 2011, Boston Private filed an amended
10 complaint adding First Republic as a defendant. The
11 amended complaint alleges Rassiger's violation of the
12 Federal Computer Fraud and Abuse Act, the CFAA, and also
13 contains eight state law claims against Rassiger,
14 particularly misappropriation of trade secrets, breach
15 of the fiduciary duty of loyalty, breach of contract,
16 breach of implied contract, breach of the implied
17 covenant of good faith and fair dealing, tortious
18 interference with contractual relations, tortious
19 interference with actual and/or prospective economic
20 advantage, and conversion. The only claim against First
21 Republic is for conversion. And yesterday on June 21, a
22 motion for a preliminary injunction directly against
23 First Republic was filed. It has not yet been fully
24 briefed.

25 The standard for obtaining a motion for a

1 preliminary injunction is familiar but important. The
2 burden of proof is on the plaintiff. The Court is
3 required to weigh four factors. The first is whether
4 the plaintiff has shown a likelihood of success on the
5 merits. The second is whether the plaintiff has
6 established an imminent threat of irreparable harm in
7 the absence of a preliminary injunction. The Court is
8 also required to balance the hardship to the plaintiff
9 if no injunction is issued against the hardship to the
10 defendants if the requested injunction is ordered. In
11 addition, the Court must consider the effect of the
12 proposed injunction on the public interest.

13 The First Circuit has stated, on a number of
14 occasions, that the likelihood of success on the merits
15 is of primary importance, it is the sine qua non for
16 obtaining preliminary injunctive relief. If a great
17 showing of likely success on the merits is made by a
18 plaintiff, a reduced showing of irreparable harm may be
19 appropriate, as the First Circuit has said in cases such
20 as **Ross-Simons**, 102 F. 3rd at 19 and **Astra**, 94 F. 3rd at
21 743. In addition, a preliminary injunction is an
22 equitable remedy, it does not issue automatically, even
23 if the foregoing criteria indicate that an injunction is
24 warranted.

25 While the parties haven't addressed it, there's

1 also the requirement for a bond if an injunction issues
2 and I'll discuss that requirement after I explain my
3 ruling.

4 I find that the plaintiff has demonstrated a
5 likelihood of success on the merits of at least its
6 misappropriation of trade secrets and breach of
7 fiduciary duty claims, two of the three briefed in
8 connection with the motion for a preliminary
9 injunction. I also find that the plaintiff is likely to
10 prevail on the Computer Fraud and Abuse Act claim, but
11 I'm not relying on that because I think there are some
12 complicated legal issues there.

13 With regard to misappropriation of trade secrets,
14 to establish a common law claim for misappropriation of
15 a trade secret the plaintiff must prove that, one, the
16 matter in question is a trade secret. Two, it took
17 reasonable steps to preserve the matter's
18 confidentiality. And three, the defendant utilized
19 improper means or participated in his own or another's
20 breach of a confidential relationship to acquire and use
21 the trade secret. I wrote that in ***Picker International***,
22 931 F. Supp. 18 at 35, summarizing the relevant
23 Massachusetts case law.

24 The statutory codification in Mass. General Law
25 Chapter 93, Section 42, of the tort of misappropriation

1 of trade secrets, "does not appear to alter the common
2 law prima facie elements for the tort," as Judge Skinner
3 wrote in **Data General**, 795 F. Supp. 501 at 507. There
4 are generally six factors to consider to determine
5 whether something is a trade secret. These are
6 described in **Jet Spray**, 361 Mass. 845 at 840. I also
7 discuss them in **Picker**. They're the Restatement of
8 Torts Section 757, Comment B, factors. The key factor
9 in this case is whether Boston Private took adequate
10 measures to protect what it characterizes as a trade
11 secret. And I predict, based on what I know, that it
12 will establish all of the criteria for a trade secret
13 including that requirement.

14 Mr. Rassiger worked for Boston Private Bank in
15 connection with its nonprofit clients. His computer use
16 was governed by Boston Private's "IT Acceptable Use
17 Policy" and its conduct code. The IT policy provides
18 that: "All messages, files and attachments that are
19 created, composed, sent or received on the computer
20 equipment, electronic mail, or Internet systems, are and
21 remain the property of the bank." The IT policy also
22 provides that confidential files and NonPublic Personal
23 Information, NPPI, must never be stored on portable
24 media devices such as USB flash drives. Mr. Rassiger
25 electronically acknowledged receipt of the IT policy on

1 May 18th of 2010.

2 As a Boston Private employee Rassiger was also
3 subject to Boston Private's code of business conduct and
4 ethics, the "Conduct Code." The Conduct Code provides
5 that all employees must act in the best interests of the
6 company and avoid situations that present a potential or
7 actual conflict between their personal interests and the
8 company's interests. The code also prohibits employees
9 from using Boston Private property or information for
10 personal gain, from disclosing confidential information,
11 and the Conduct Code provides that upon leaving the
12 company employees must return to the company all
13 confidential and/or proprietary information of the
14 company in their possession. For purposes of the
15 Conduct Code, "confidential information" includes all
16 nonpublic information that might be of use to
17 competitors or harmful to the company or its customers
18 if disclosed. Rassiger electronically acknowledged
19 receipt of the Conduct Code on May 18th, 2010.

20 Rassiger was speaking to First Republic in
21 November of 2010 about possible employment with First
22 Republic. He may have received a job offer informally
23 as early as November 15th, 2010.

24 Starting by November 9th, 2010, Rassiger
25 downloaded files from Boston Private Bank servers on at

1 least six dates and maybe nine times, or it appears,
2 it's argued nine times on those six dates, between
3 November 9th, 2010 and November 14th, 2010. Rassiger,
4 between those dates, downloaded files from Boston
5 Private's server to a personal USB drive. At least two
6 such downloads occurred after Rassiger received First
7 Republic's offer letter, formal offer letter on December
8 10th, 2010. Boston Private has also discovered that
9 Rassiger e-mailed various Boston Private documents to
10 his personal e-mail accounts. These documents and files
11 include the terms, conditions, structure and maturity
12 dates of particular bonds, loans or mortgages as well as
13 templates for such agreements, client-specific term
14 sheets, customer correspondence including commitment
15 letters, internal Boston Private guidelines for pricing
16 a tax-exempt bond and the financial model underlying
17 that pricing, spreadsheets containing lists,
18 confidential information and other client details for
19 existing and prospective customers for both the bank's
20 commercial lending division as well as its deposit and
21 cash-management division, board presentations made by
22 others including those outside the commercial lending
23 division, strategy documents such as strategic plans
24 developed in consultation with outside consultants to
25 whom the bank paid hundreds of thousands of dollars, and

1 detailed proprietary human resources leadership and
2 commercial lending documents.

3 In total it appears that Rassiger copied over 1500
4 documents including hundreds of confidential files.
5 Among these files are documents relating to the
6 customers, now characterized as private schools, and in
7 the papers referred to as "A" and "B," including their
8 credit applications, term sheets, balance sheets, and
9 loan agreements. One of the files that Rassiger
10 evidently sent to his personal e-mail account is a
11 document identifying Customer A as a target to pursue.
12 Another is a document listing Boston Private's entire
13 commercial loan portfolio for 2010.

14 Rassiger claims that, quote: "For the most part,
15 these company documents were unquestionably
16 nonconfidential and did not reflect protected trade
17 secrets or similarly classified information," end
18 quote. He describes the bulk of the documents as
19 "personal documents," including "e-mails from my wife,
20 letters to my young children, correspondence with my
21 accountant, my tax returns, and information about my
22 taxes, information about my personal community
23 involvement, and our family Christmas card list."
24 However, in his declaration he states: "When I was
25 compiling that personal information I copied certain

1 other documents that I had worked on or used at Boston
2 Private generally with the vague notion that such
3 documents might be useful solely as forms at some
4 undefined future time and place and/or because I was
5 proud of my efforts on the documents in question and
6 wanted to make sure I had them as some kind of
7 keepsakes." He states: "While I do not dispute Boston
8 Private's contention that I acknowledged a policy
9 regarding attachment of USB flash drives to my computer,
10 I was not conscious or deliberately attempting to
11 violate that or any other Boston Private policy when I
12 reviewed and copied the documents at issue."

13 Rassiger contends that the files he downloaded and
14 e-mailed to himself were not trade secrets and were
15 instead, quote, "concerned generic information regarding
16 loans, including terms, conditioned structure and
17 maturity dates, term sheets, correspondence, guidelines,
18 board presentations, and training documents." Rassiger
19 also contends that Boston Private made insufficient
20 efforts to keep these files secret and that he was not
21 subject to any nondisclosure or noncompete or
22 nonsolicitation agreements.

23 But first I find that some of what Mr. Rassiger
24 characterizes as "generic" are trade secrets, um, but --
25 and I note these only to be representative. The files

1 Rassiger downloaded and e-mailed to himself appear to
2 have been neither generic nor public.

3 For example, on December 8th, 2010, two days
4 before receiving an offer from First Republic, Rassiger
5 e-mailed himself a credit application for a \$27.5
6 million bond submitted by a prospective Boston Private
7 customer, according to Brown's supplemental declaration,
8 Paragraph 6. This application has been reviewed by a
9 Boston Private -- I'm sorry. This application had been
10 reviewed by a Boston Private credit analyst and
11 contained a proprietary risk benefit assessment and an
12 evaluation of Boston Private's strategic relationship
13 with the prospective customer. In addition, on January
14 24th, 2011, only weeks before resigning from Boston
15 Private, Rassiger e-mailed himself a file listing Boston
16 Private's entire commercial loan portfolio, including
17 customer names and risk ratings. And Rassiger also
18 copied onto a USB drive credit applications submitted by
19 Customers A and B. The copying of the entire commercial
20 loan portfolio, among other things, makes to me
21 Mr. Rassiger's contention that he wanted keepsakes of
22 his work product unconvincing.

23 As I noted earlier -- well, before we get to
24 that.

25 Moreover, on the present record, I find that

1 Boston Private took care to ensure the confidentiality
2 of the files I've just referenced and similar files.
3 Boston Private protects its computers and e-mail servers
4 with passwords and controls remote access to its servers
5 by requiring employees to apply for a remote
6 authorization password and token capable of generating
7 an authentication code. In addition, Boston Private
8 utilizes a three-tiered document classification system
9 in which documents are categorized as "public,"
10 "internal," or "restricted," depending on the
11 sensitivity of the document's contents.

12 Per regulations posted on Boston Private's
13 Internet, employee access to internal and restricted
14 documents is limited and employees are prohibited from
15 storing any internal or restricted documents on their
16 computers or mobile devices. In addition, employees are
17 only permitted to e-mail restricted documents via an
18 encrypted e-mail service and Boston Private maintains
19 its client records on a password-protected platform,
20 employee access to which is reviewed on a quarterly
21 basis. Boston Private represents that many of the files
22 Rassiger downloaded or e-mailed to himself are
23 classified as "restricted" and contained nonpublic
24 personal information such as customer names paired with
25 a loan or an account number. There's nothing that

1 refutes this contention.

2 In addition, Rassiger, as I said earlier, was
3 subject to the Boston Private IT policy and conduct code
4 which when observed provide protection for confidential
5 information. As I noted earlier, I believe the IT
6 policy provides that all messages, files and attachments
7 that are created, composed, sent or received on the
8 computer equipment, electronic mail, or Internet
9 systems, are and remain the property of the bank and the
10 conduct code prohibits employees from disclosing
11 confidential information and provides that upon leaving
12 the company the employees must return to the company all
13 confidential and/or proprietary information of the
14 company in their possession. Mr. Rassiger didn't do
15 this. Basically I find that many of the files that
16 Mr. Rassiger took from Boston Private were trade
17 secrets.

18 At this hearing, counsel for Mr. Rassiger and for
19 the First Republic Bank argued that he did not use any
20 of the trade secrets that he took or may have taken, in
21 their view. At the moment I don't find that it's likely
22 that that will be proven at trial. There's basically no
23 reason to steal trade secrets, including the entire
24 commercial loan file of Boston Private, if somebody
25 experienced in the industry like Mr. Rassiger doesn't

1 feel it has commercial value and intends to use it. As
2 I said, based on what's been presented to me, it doesn't
3 seem likely it would be found that he took these files
4 as mementos of his fine work for Boston Private. He
5 took them because he thought they were valuable and it
6 would help his new employer. And it's necessary at this
7 point, where there's not been any discovery, to rely
8 particularly perhaps on circumstantial evidence, but I
9 infer that being knowledgeable enough in the industry to
10 have been recruited by First Republic, Mr. Rassiger knew
11 what was useful and he took it because he intended to
12 use it and that contributes to my conclusion that he
13 did. But there's also direct evidence. The declaration
14 of August-deWilde, submitted by the defendants, says
15 that First Republic learned of interest rates that
16 Customers A and B were paying from both Mr. Rassiger and
17 the clients.

18 The facts I've just recited also indicate that the
19 plaintiff is reasonably likely to prevail on the breach
20 of fiduciary duty claims. Basically to establish a
21 breach of fiduciary duty: "A plaintiff must prove the
22 existence of a fiduciary duty, a breach of that duty,
23 causation and damages," as the Mass Appeals Court said
24 in **Hanover Insurance**, 46 Mass Appeals Court 153 at 164.

25 The existence of a fiduciary duty of loyalty is

1 presumed for management-level employees like
2 Mr. Rassiger. As the Supreme Judicial Court said in
3 **Chelsea Industries**, 389 Mass 1 at 11: "Employees
4 occupying a position of trust and confidence owe a duty
5 of loyalty to their employer, they must protect the
6 interests of the employer." As the SJC said in **Augat**,
7 409 Mass 165 at 172 to 173, an employee may prepare to
8 compete with his employer while still employed provided
9 that in the course of such preparations he or she does
10 not otherwise act in violation of their fiduciary duty.
11 As the SJC put it: "An at-will employee may properly
12 plan to go into competition with his employer and may
13 take active steps to do so while he is so employed.
14 There are, however, certain limitations on the conduct
15 of an employee who plans to compete with his employer,
16 he may not appropriate his employer's trade secrets, he
17 may not solicit his employer's customers while still
18 working for his employer, and he may not carry away
19 certain information such as lists of customers." That's
20 **Augat**, 409 Mass 165 at 172 and 173, reiterating the
21 Restatement III of Agency, Section 8.03.

22 Here I find that the plaintiff is likely to prove
23 that Rassiger misappropriated trade secrets of Boston
24 Bank and used them to solicit Customers A and B, and
25 discovery will show whether, as may be the case, that

1 confidential information and trade secrets were used
2 more widely.

3 As I said earlier, I am not relying, in this
4 analysis, on the Federal Computer Fraud and Abuse Act
5 Claim. The breach of fiduciary duty, if proven, may
6 well be enough to establish the CFFA claim on the prong
7 of exceeding authority, if the First Circuit's decision
8 in **EF-Cultural**, 274 F. 3rd at 581 to 582, predicts the
9 First Circuit's view on how the statute ought to be
10 interpreted, which is relatively broadly. But it's not
11 essential to rely on the statute for the purposes of
12 deciding whether a preliminary injunction is
13 appropriate. Since the plaintiff has made a strong
14 showing of the likelihood of success on the merits, a
15 reduced showing of the threat of irreparable harm is
16 permissible and I find, in this case, appropriate.

17 In this case, Mr. Rassiger, it appears on the
18 present record, has misappropriated trade secrets. I
19 find that there would be no adequate remedy at law for
20 the use of those trade secrets, and subtle ways in which
21 the trade secrets could be used may be difficult to
22 discern and demonstrate. But more particularly for
23 these purposes, the argument today indicates how hard it
24 might be to value the lost business or particularly the
25 loss of goodwill or the general head start that the

1 trade secrets could give First Republic, which is trying
2 to enter this new market.

3 With regard to the balance of hardships, it
4 heavily favors the plaintiff. As I said, it could be --
5 it would be, I predict, irreparably harmed if its trade
6 secrets were used by a competitor. There is no unfair
7 hardship to Mr. Rassiger or First Republic. The order
8 I'll issue will be shaped to remove any unfair advantage
9 they have and require them to compete without the
10 benefit of Private Bank's confidential information,
11 which is the way they should have been competing from
12 Day 1.

13 I find the public interest is also served by the
14 issuance of the injunction. Free and fair competition
15 is a very good thing, but people invest in developing
16 confidential information and trade secrets, the law
17 prohibits the misappropriation of them, and it's in the
18 public interest to enforce the law.

19 Now, the parties didn't -- so I am going to issue
20 a written preliminary injunction. It will essentially
21 require the maintenance of the records that apparently
22 -- well, that I found, for present purposes, have been
23 misappropriated and prohibit their use by Mr. Rassiger
24 or anyone working in concert with him, including First
25 Republic. There are some discovery issues and the

1 discovery issues I will refer to Magistrate Judge Boal
2 who will hear you on them, if you can't resolve them,
3 and you have made some progress, so perhaps you can
4 resolve them.

5 Under Rule 65(c), an injunction shouldn't issue
6 unless a bond in an appropriate amount is issued. At
7 the moment -- in case it turns out that a party has been
8 wrongfully restrained. At the moment I don't have any
9 evidence as to what the amount of the bond should be and
10 I may peg it at \$25,000 or something like that, unless
11 somebody would like to be heard on the issue.

12 MR. GLOVSKY: Well, as I recall the rule, your
13 Honor, it allows for a waiver of the bond and I think
14 that might be appropriate in this instance.

15 THE COURT: I think you recall the rule from
16 when you worked in the Department of Justice. It's only
17 the United States that's exempt from the bond
18 requirement.

19 All right. Well, I'm going to impose a \$25,000
20 bond.

21 I don't know whether I'm going to schedule the
22 rest of this case, discovery, right now or not, but I
23 think I will see the lawyers in the lobby. When I do
24 schedule discovery, whether it's now or no later than
25 early August, I don't anticipate allowing a long period

1 for discovery. I think it's important to all the
2 parties that this get resolved, if you can't resolve it
3 by agreement and it has to be litigated. So I'm
4 thinking a couple of months, not a couple of years. I
5 mean, there's a sharp focus to this and if Mr. Rassiger
6 and his new employer have, as it appears to me now,
7 trade secrets, they should be returned and any damages
8 should be determined. On the other hand, if this
9 necessarily preliminary review on the limited record
10 doesn't predict the ultimate outcome, Mr. Rassiger and
11 First Republic ought to be able to get on with it
12 without the possibility chilling effect of this
13 litigation.

14 So it's 5 minutes of 12:00. I'll see you in about
15 5 minutes in the lobby and I'll -- I will issue, of
16 course, a written order that defines the scope of the
17 preliminary injunction and puts everybody on clear
18 notice, but that will be later today.

19 The Court is in recess. And the gentleman on the
20 phone should stay on the phone. We'll be back to you
21 when we get to my lobby. The Court is in recess.

22 And, actually, Mr. Brooks, if you want to bring
23 Mr. Rassiger back there, you're welcome to do that.

24 MR. BROOKS: Okay. Thank you, your Honor.

25 (Ends, 12:00 p.m.)

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the foregoing record is a true and accurate transcription of my stenographic notes, before Chief Judge Mark L. Wolf, on Wednesday, June 22, 2011, to the best of my skill and ability.

/s/ Richard H. Romanow 6-24-11

RICHARD H. ROMANOW Date